Supreme Court, U.S.
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No. 93-1312

In The

Supreme Court of the United States

October Term, 1993

ELAINE TROSCLAIR AUTHEMENT, INDIVIDUALLY, AS ADMINISTRATRIX OF THE SUCCESSION OF CARL AUTHEMENT, JR. AND AS LEGAL TUTRIX OF THE MINOR CHILDREN, JEREMY J. AUTHEMENT, TINA C. AUTHEMENT, CARL J. AUTHEMENT, III, BRIDGETTE M. AUTHEMENT, AND HONEY L. AUTHEMENT, AND CARL J. AUTHEMENT, SR.,

Petitioners,

v.

CITGO PETROLEUM CORPORATION,

Respondent.

FLORIDA FUELS, INC.,

Petitioner,

v.

CITGO PETROLEUM CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO JOINT PETITION FOR WRIT OF CERTIORARI

GREGORY P. MASSEY
Attorney at Law
1301 Common Street
P.O. Box 3148
Lake Charles, LA 70602
(318) 439-2774

Attorney for Respondent,
CITGO Petroleum Corporation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Does the Fifth Circuit's decision in this case conflict with this court's ruling in *Kermarec v. Compagnie Generale TransAtlantique,* 358 U.S. 625 (1959)?

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

In accordance with Rule 29.1 of the Supreme Court Rules, CITGO Petroleum Corporation files this list of parent companies and non-wholly owned subsidiary companies:

PARENT COMPANIES – CITGO's immediate parent is PDV America, Inc. whose immediate parent is Propernyn, whose immediate parent is Venedu, whose immediate parent is Petroleos de Venezuela, S.A.

NON-WHOLLY OWNED SUBSIDIARIES – Badger Pipe Line, Cit-Con Oil Corporation, CITGO Asphalt Refining Company, Colonial Pipeline Company, East Texas Mainline, Explorer Pipeline Company, Kaw Pipe Line, Lake Charles Pipeline, Lyondell-CITGO Refining Company, LTD., Mesa Pipeline Company, Mt. Vernon Phenol Company, Nelson Industrial Steam Company, Providence Terminal Association II, Texas Phenol Plant, Texas-New Mexico Pipe Line, Thyssen CITGO Petcoke Corporation, United Auto Service Corp., West Shore Pipe Line, West Texas Gulf Pipe and Wolverine Pipe Line.

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CITGO Petroleum Corporation (CITGO) files this, its Brief In Opposition to Joint Petition for Writ of Certiorari.

CITGO respectfully urges this Court not to exercise its discretion by granting the writ because joint petitioners have not set forth valid reasons for the issuance of the writ in accordance with Rule 10.1 of the Supreme Court Rules.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1993. A suggestion for rehearing en banc was denied on February 10, 1994. The jurisdiction of this court was evoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On April 10, 1990, Carl Joseph Authement, Jr. was killed as a direct result of the gross negligence of his Jones Act employer and the unseaworthiness of the M/V Todd Rick and the barge Osprey, both vessels owned by Mr. Authement's employer. Mr. Authement was employed by Florida Fuels, Inc., petitioner herein, as a deckhand. CITGO Petroleum Corporation, respondent herein, is involved in this case only because the tragic accident happened to occur adjacent to CITGO's dock in Calcasieu Parish, Louisiana.

All parties to this proceeding including Mr. Authement's survivors, Florida Fuels and CITGO agree that the cause of this accident was the employer's furnishing of a rickety old aluminum extension ladder as the sole means

of ingress and egress from the tug and tow to the various ports of call. Joint Petition For Writ of Certiorari, pp. 4-5.

The accident occurred while Mr. Authement was carrying out his assigned duties, one of which was to handle lines and assist the captain in safely mooring the vessels. After the Florida Fuels' vessels were safely moored to CITGO's dock, one of the other members of the crew of the vessel lowered the aluminum ladder to Mr. Authement so that he could gain access to the Osprey. While Mr. Authement was climbing up the ladder, he fell into the waters of the Calcasieu ship channel and drowned.

The Authement family sued Florida Fuels in Texas State Court on counts of unseaworthiness and negligence under the Jones Act, 46 U.S.C. § 688. The Authement survivors settled their Jones Act and unseaworthiness claims against Florida Fuels and reserved all rights to recover damages for loss of society against CITGO.[1] As a condition of the settlement, the Authements were obligated to pursue a negligence claim against CITGO Petroleum Corporation but if anything was recovered, the Authement survivors had to split the money fifty-fifty with Florida Fuels.

The procedural history of the case from the point of the settlement to this Joint Petition for Writ of Certiorari is correctly recited by petitioners at pages 3 and 4 of the Joint Petition. Accordingly, respondent will not repeat the details of how this case comes before the court except to

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[1] Survivors are precluded from recovering damages for loss of society under both the Jones Act and the general maritime law. *Miles v. Apex Marine Corp.*, 111 S.Ct. 317, 498 U.S. 19 (1990).

say that the appellate history began with the granting of a summary judgment in favor of CITGO Petroleum Corporation.

SUMMARY OF THE ARGUMENT

The pretext under which this Writ of Certiorari is sought by petitioners is that the Fifth Circuit Court of Appeals and the District Court rendered a decision which allegedly conflicts with the decision of this court in *Kermarec v. Compagnie Generale TransAtlantique*, 358 U.S. 625 (1959). The Fifth Circuit decision does not conflict with *Kermarec* or any other decision of this court.

Kermarec stands for the proposition that the common law concepts of licensee and invitee, and the corresponding duty which a land owner owes to each category of persons on his premises, are not well suited to a maritime application. Hence, the court abolished the common law distinctions between licensee and invitee in the maritime context and held that the ship owner's duty to all persons lawfully on board is one of exercising reasonable care under the circumstances of each case. However, *Kermarec* specifically authorized and condoned a more onerous duty on a ship owner toward those persons in his employ, i.e. seaman. Thus, although abolishing the land based concepts of licensee and invitee, the court specifically recognized that a duty which a ship owner owes to one class of persons could be more onerous or less onerous than a duty which the same ship owner owes to another class of persons.

The Fifth Circuit decision in the instant case does not conflict with *Kermarec* in any sense of the word. Nothing in the opinion suggests that CITGO did not owe Mr. Authement a duty of exercising reasonable care under the circumstances. The Fifth Circuit simply acknowledged that the dock owner's duty to Mr. Authement in this case did not extend to furnishing him with the gangway since that duty is one from which the ship owner can never be relieved.

ARGUMENT

The only relevant facts which this court should concern itself with are:

1. The ladder being used by Mr. Authement to board the vessel was owned by Florida Fuels and the crew was instructed to use the ladder by the captain; R. 80, 100, 101;

2. There have been no suggestions in the pleadings or other documents in the record that there was anything on the dock which was unreasonably dangerous or which contributed in any way to the accident;

3. The ladder was the only means of ingress and egress provided by the vessel; R. 80, 100, 101; and

4. After the accident, Florida Fuels purchased a suitable gangway; R. 267.

None of the foregoing facts are disputed. CITGO Petroleum Corporation very simply did nothing whatsoever to cause or contribute to this tragic accident.

In determining whether CITGO's motion for summary judgment should be granted, the Magistrate Judge in the District Court focused on the duty of a dock owner because the question of duty is a question of law rather than a question of fact. In his report and recommendation, Magistrate Wilson correctly noted that custom in the industry with respect to whether dock owners normally provide gangways for boarding vessels is not material to the legal question of whether a dock owner owes a duty to a seaman to provide a safe means of ingress and egress. R. 308. If the District Court or the Court of Appeals had found that a duty existed, then the disputed fact of whether it was the custom of the industry for dock owners to provide gangways to members of the crew of vessels calling at the dock, would have been material to the determination of whether CITGO acted reasonably to Mr. Authement or in other words, whether there was a breach of duty. The determination of a breach of duty is generally a question of fact under a duty-risk analysis. *Chavez v. Noble Drilling Corp.*, 567 F.2d 287 (5th Cir., 1978).

There has never been a case which has held that a dock owner has a duty to provide a gangway to a member of a crew of a vessel calling at the dock. The dock owner's duty of due care to a seaman only extends to the dock and its appurtenances and has never been extended to apply to a ship's ladder or gangway. In fact, the law in the Fifth Circuit is clear that a dock owner does not owe a duty to provide vessel crew members with gangways. *Daniels v. Florida Power & Light Company*, 317 F.2d 41 (5th Cir., 1963) cert. den., 84 S.Ct. 78 (1963) and *National Marine Service, Inc. v. Gulf Oil Company*, 433 F. Supp. 913

(E.D. La. 1977) affd. without op., 608 F.2d 522 (5th Cir., 1979).

The reasoning of the lower court in this case is both logical and consistent with *Kermarec*. It is logical because it encourages ship owners to carry safe gangways on board in those situations in which gangways are not available at docks. If the Fifth Circuit had held that CITGO owed a duty to supply a gangway, ship owners would be less inclined to carry gangways knowing that dock owners owed such a duty to vessel crew members. The lower court decisions were consistent with *Kermerac* in that it was specifically held that dock owners owed a duty of care to persons using their dock, but the duty did not extend to supplying vessel crew members with gangways.

In this case, because of Mr. Authement's status as a seaman, he was owed on the one hand an absolute duty by the ship owner to furnish a safe gangway and a seaworthy vessel. On the other hand, the dock owner owed him a duty of reasonable care under the circumstances. The lower courts relying on valid precedent held that the duty did not extend to supplying him with a gangway. The difference in the duty owed by the two alleged tortfeasors, CITGO and Florida Fuelds, is based on status, a distinction which *Kermerac* specifically recognized.

Petitioners' reliance on *Kermarec* is misplaced. In *Kermarec*, the plaintiff was invited aboard a ship by the captain and was injured on a ship's stairway as the result of a defective stair step. The District Court applied out

dated concepts of "licensee" and "invitee" to the standard of care which the ship owner owed to the visiting plaintiff. The issue facing this court was whether admiralty recognizes the same distinctions between an invitee and a licensee as in common law.

Finding that the common law distinctions between licensees and invitees were foreign to the law of admiralty, this court held as follows:

> "We hold that the owner of a ship in navigable water owes to all who are on board for purposes not inimical to his legitimate interest the duty of exercising reasonable care under the circumstances of each case." 358 U.S. at 632.

The suggestion of petitioners that *Kermarec* abolished all jurisprudentially created standards of care which one class of persons may owe to another class of persons is simply not true. The Court was careful to point out that concepts of status and duty are very relevant in maritime law as well as common law. For example, the ship owner in *Kermarec* owed a higher duty to the ship's crew because of their status than was owed to the visiting plaintiff. The crew members were owed an absolute duty to a seaworthy vessel. 358 U.S. at 632. Although not stated in the *Kermarec* opinion, the ship owner also owed its crew members a nondelegable duty to provide a safe means of ingress and egress to and from the ship. *Massey v. Williams-McWilliams, Inc.*, 414 F.2d 675, 679 (5th Cir., 1969); cert. den., 396 U.S. 1037, 90 S.Ct. 682, 24 L. Ed.2d 681 (1970); *Superior Oil Co. v. Trahan*, 322 F.2d 234, 235 (5th Cir., 1963).

Thus, variations in standards of care depending on status are well recognized in general maritime law. In their Joint Petition, petitioners cite the example of the barge inspector and a seaman both being killed on a ship's gangway. It is true that there are different duties which the ship owner owes to the barge inspector and the seaman. A much higher duty of care is owed to the seaman, i.e. a nondelegable duty to provide a seaworthy vessel and a safe gangway. To the barge inspector, the ship owner would only owe a duty of reasonable care under the circumstances. There are circumstances under which the barge inspector may not recover against the ship owner whereas the seaman, because of his status, could recover against the vessel owner. The same would be true for a longshoreman whose remedy under Section 905B of the Longshore Act would be a negligence action against the ship owner whereas the seaman's remedy lies under the Jones Act and the General Maritime Law Doctrine of Unseaworthiness.

The point which petitioner misses is that there are very often disparate results when multiple parties are injured in common accidents. For example, if an explosion at CITGO's refinery had been the cause of Mr. Authement's death, the recovery of every person injured in that explosion would be based upon that person's status vis a vis CITGO. Assuming CITGO's negligence in such an explosion, the survivors of Mr. Authement would recover from CITGO on a negligence theory whereas a dock worker employed by CITGO would be barred from recovery by virtue of the exclusivity provisions of the Longshore and Harbor Workers Compensation Act. Contractor employees who might have been injured or killed

in the accident could be treated differently depending upon the type of work being done by them at the time of the explosion. One contractor employee might be a borrowed servant of CITGO where as another contractor employee may have a cause of action against CITGO.

Another example of disparate treatment depending on status and duty owed can be found in the recent Fifth Circuit case of *Forrester v. Ocean Marine Indemnity Co.*, 11 F.3d 1213 (5th Cir., 1993). In that admiralty case, it was held that an oil company's status as a time charterer of a vessel imposed upon it no duty to passengers for the safe embarkation or disembarkation. Had the oil company been found to be a bareboat charterer, such a duty would have been owed to passengers.

The examples of disparate results cited above are by no means unique. There are endless rules of law, both maritime and common law which elevate or eliminate duty depending on status of the parties.

In the case at bar, even though it is unfortunate for the Authement survivors that they could not recover damages for loss of society [see *Miles v. Apex Marine Corp.*, 111 S.Ct. 317, 498 U.S. 19, (1990)], on the other side of the coin, because of Mr. Authement's status as a seaman and the absolute duty of the vessel owner, the remedies available to the Authement survivors under the Jones Act and general maritime law against the ship owner caused Florida Fuels to agree to pay a lucrative settlement to the survivors R. 134-139. It would appear that the extraordinarily high degree of care owed by the Jones Act employer in this case precipitated the settlement.

Kermarec was significant in that it abolished the common law distinctions between licensee and invitee in the maritime context but it should not be interpreted as broadly as petitioners want in this case. This Court in *Kermarec* simply followed the trend of courts in many states by recognizing that the distinctions between licensees and invitees were outdated. Louisiana abolished such distinctions in 1976. *Cates v. Beauregard Electric Cooperative, Inc.*, 328 So.2d 367 (La. 1976). *Kermarec* allows courts to base distinctions in duty on the status of parties vis a vis each other. The lower court followed *Kermarec* by holding that dock owners do not have a duty to supply vessel crew members with gangways.

The duty of Florida Fuels to Mr. Authement arises from the doctrine of "seaworthiness." As the Fifth Circuit pointed out in its opinion in this case:

> "It is well settled, however, that the doctrine of 'seaworthiness' is not applicable to a dock owner who does not occupy the position of owner or operator of the vessel. *Daniels v. Florida Power & Light Co.*, 317 F.2d 41, 44 (5th Cir., 1963), cert. den., 375 U.S. 832, 84 S.Ct. 78, 11 L. Ed.2d 63 (1963); *Baker v. Raymond International, Inc.*, 656 F.2d 173, 181 (5th Cir., 1981), cert den., 456 U.S. 983, 102 S.Ct. 2256, 72 L.Ed. 2d 861 (1982)." 6 F.3d at 323

CITGO owed Mr. Authement a duty to exercise reasonable care by providing him with a dock which was reasonably safe. CITGO's duty did not extend to providing a gangway. That duty was owed by Florida Fuels

under its absolute duty to provide Mr. Authement with a seaworthy vessel.

CONCLUSION

Joint Petitioners have not set forth valid reasons why the Court should grant the Writ of Certiorari in accordance with Rule 10.1 of the Supreme Court Rules. The decision of the Fifth Circuit Court of Appeals does not conflict with *Kermarec* or any other decision of this Court.

This Court is respectfully urged to deny the Joint Petition for Writ of Certiorari.

Respectfully Submitted,

GREGORY P. MASSEY
Attorney at Law
P.O. Box 3148
1301 Common Street
Lake Charles, LA 70602
(318) 439-2774

/s/ Gregory P. Massey
GREGORY P. MASSEY (#8765)